appeal from Monson v DHSS 87-76-PC 6/20/88

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 2

LARRY W. MONSON,

Petitioner,

vs. Case No. 88-CV-4059

WISCONSIN PERSONNEL COMMISSION,

Respondent.

MEMORANDUM DECISION AND ORDER

Petitioner, Larry W. Monson, requests a review of a decision of the State Personnel Commission (PC), after it reviewed the Department of Health and Social Service's (DHSS's) one day suspension of him. Petitioner was the Director of the Office of Alcohol and Other Drug Abuse (OAODA) from August 1982 to the present. DHSS determined that petitioner violated five of the Department's work rules. On June 20, 1988, the PC affirmed the action of the DHSS in suspending petitioner and dismissed petitioner's appeal of the suspension. The PC's decision amended and adopted a proposed decision and order of a hearing examiner which was issued on April 20, 1988. Because I find that the PC's findings were based on substantial evidence in the record, the decision of the Personnel Commission is affirmed.

STATUTES INVOLVED

Sec. 230.34(1)(a), stats., provides:

An employe with permanent status in class may be

> removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Sec. 230.44(1)(c) stats., provides:

> **Demotion, layoff, suspension or discharge.** If an employe has permanent status in class, the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

The "just cause" requirement in sec. 230.34(1)(a), stats., is to prevent employees from being disciplined arbitrarily or capriciously. Safransky v. Personnel Board, 62 Wis. 2d 464 (1974). However, the primary purpose of the civil service law is to improve the efficiency of public service and not to guarantee tenure or absolute immunity from discipline for the individual employee. Sec. 230.01(1), stats., and Jabs v. State Board of Personnel, 34 Wis. 2d 245, 250 (1967).

In reviewing this type of case, the court must determine whether there is substantial evidence to show that the employee was guilty of the conduct complained of and if so, whether that conduct warrants the type of disciplinary action taken. Safransky, at 472. The appointing officer must present evidence to sustain the suspension and has the burden of proving just cause. Safransky, at 472. The Commission must make findings which are proven by the greater weight of the credible evidence. Safransky, at 472. The credibility of the witnesses and the weight of the evidence are matters exclusively for the determination of the commission. Safransky, at 473.

The PC found that petitioner violated Department Work Rule Number 1, which provides:

> 1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions or instructions.

Petitioner was charged with failing to provide a full explanation of why the Department did not support a Commission concept at the CCAODA executive committee meeting. The Commission Concept would mean the creation of an independent Commission on Alcohol and Other Drug Abuse and would thus alter the existing organizational structure of the delivery of alcohol and other abuse services. Petitioner argues that the PC disregarded the facts and circumstances of the case in determining that he committed this work rule violation. Petitioner then recites testimony that would give rise to the alternative inference that petitioner did express a negative opinion on the Commission and that DHSS's position was well known on the matter so there was no need to reiterate it. However, it is irrelevant whether there is substantial evidence to support findings that were not made by the Commission. Eastex Packaging Co. v. ILHR Department, 89 Wis. 2d 745, 749 (1979).

Petitioner's argument misses the point. The question is not whether there was some evidence on which to base alternative inferences to the commission's findings. Instead, the court must examine the record to determine whether there was substantial evidence which supports the agency's decision even if two conflicting views could be

sustained based on the evidence. Vande Zande v. ILHR Department, 90 Wis. 2d 408, 418 (1979). In the present case, a review of the record illustrates that the PC thoroughly considered and carefully analyzed all the evidence presented. The Commission noted that seven of the ten persons present at the meeting testified, but only the plaintiff testified that he had explained DHSS's position on the commission concept. The Commission noted that petitioner admitted it was unnecessary to explain DHSS's position because all the persons at the meeting were knowledgeable about the existing structure, and its benefits had been covered in other meetings. Thus, even petitioner's own testimony could lead to the conclusion that he failed to explain the employer's position on the Commission concept. Furthermore, Mr. Strosahl, Chairperson of the Citizen's Council, indicated a desire to have a full discussion of the commission idea, yet plaintiff merely said that DHSS did not support such a concept and did not explain why the existing structure was preferable. Thus, it is apparent that there was conflicting testimony and that the PC carefully considered the evidence and decided in favor of DHSS. Furthermore, the PC carefully considered why the behavior constituted misconduct. It considered his status as a high level employee and previous clear instructions to him when it made its decision that petitioner's actions violated work rule number one.

The PC also found that petitioner violated work rule number seven, which provides:

7. Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.

Petitioner's arguments concerning the finding that the telephone conversation with Dr. Herrington constituted a work rule violation only raises reasonable alternative inferences which are irrelevant. The PC clearly considered all the evidence. In fact, the PC weighed petitioner's testimony as to the evidence he gave, and considered his reasons for not giving a more detailed explanation of DHSS's position, including the context of the call and Dr. Herrington's familiarity with AODA. Thus, there is substantial evidence to support the PC's findings that petitioner committed this work rule violation.

Petitioner argues that even if there was substantial evidence to support the finding, the PC denied him due process of law by punishing him for actions that were not alleged in the charging documents. Petitioner argues that he was charged with providing information that was misleading, incomplete and/or biased. Petitioner contends that he successfully defended against these charges but that the PC found that he failed to provide Dr. Herrington with sufficient justifications for DHSS's organizational structure.

The respondent argues that the issue of sufficiency of the evidence was not timely raised because petitioner did not raise the objection until he filed his objections to the examiner's proposed decision and order. However, because

petitioner is not challenging the sufficiency of the complaint but rather the PC's decision to uphold the discipline for reasons other than those stated in the complaint, he could not have raised this issue until he had seen the examiner's decision,

However, even though the issue was not waived, petitioner has not demonstrated material error under sec. 227.57(4), stats., which provides:

> The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow a prescribed procedure.

Section 230.34(1)(b), stats., states:

> No suspension without pay shall be effective for more than 30 days. The appointing authority shall, at the time of any action under this section, furnish to the employe in writing the reasons for the action.

The charge on this issue in the suspension letter dated May 26, 1987 (Resp. Ex. 8), provides:

> The fourth incident includes the information that was supplied to Dr. Roland Herrington and Dr. David Benzer for their meeting with the Governor. The information was misleading, incomplete and biased. A great deal of information about the current Bureau of Community Programs' staffing of OAODA issues was omitted so that the entire picture was definitely not provided to Dr. Roland Herrington and Dr. David Benzer. They indicated that they received this information from you and Mr. John Vick.

These types of charges need not be technically drawn nor meet the requirements of a criminal indictment. State ex rel. Richey, 48 Wis. 2d 575, 582. In State ex rel. Messner v. Milwaukee County Civil Service Comm., 56 Wis. 2d 438, 444 (1972), , quoting Mullane v. Central Hanover Trust Co., 398

.U.S. 306, 314 (9150)., the court held that such charges must be:

> ". . . reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

The court further added that:

> In this case, the charges were specific and the employee was notified with particularity of the acts she was alleged to have committed. Patricia Messner was aware of the factual allegations she would have to disprove in order to set aside the proposed order of discharge. No attempt has been made to demonstrate that her ability to defend herself was in any way impaired by the failure of the charges to recite the provisions of the regulation, the knowledge of which she has never denied. The complaint gave sufficient notice. State ex rel. Messner v. Milwaukee County Civil Service Comm., 56 Wis. 2d at 445.

In the present case, petitioner was fully aware that the omitted data was part of the charge. The charge clearly explains that the information was misleading and incomplete because petitioner only gave one side of the story by failing sufficiently justify DHSS's organizational structure. Given the DHSS's prior warnings and the particular circumstances of the situation, petitioner should have known that merely reciting the number of reductions of positions in his office without further explanation would be misleading, at least as far as the Employer was concerned. Petitioner was a high level employee and was often called upon to act as spokesperson for the DHSS, he should have realized that by mentioning staff reductions without explaining that many of those positions had been transferred to other areas of the state government, petitioner would create the misleading

impression that alcohol and other drug abuse issues were receiving less attention and fewer resources than before the staff reductions. Petitioner had ample opportunity to defend himself on the charge, notwithstanding the difference in terminology of the finding.

Finally, petitioner contends that the PC should have remanded the case to DHSS for reconsideration of the penalty. Petitioner relies on State ex rel. Momon v. Milwaukee County Civil Service Comm., 61 Wis. 2d 313 (1973), as support for this proposition. However, the facts and the law in that case were entirely different from those of the present case. In Momon, a county civil service hospital employee was suspended by the Commission. The Supreme Court of Wisconsin found evidence to support two of the charges, but did not find evidence to support the third. The supreme court instructed the trial court to remand the case to the Commission for reconsideration and redetermination of the penalty, because, on review, the court could not determine the effect of the defective finding on the commission's decision.

However, in present case sec. 230.44(4)(c), stats., gives the PC the authority to make its own determination regarding the proper level of discipline by affirming the action of DHSS. State v. Industrial Comm., 233 Wis. 461, 465 (1940). As it is clear that the PC has carefully considered the penalty as applied to only the two remaining charges, remanding the case to the PC for "reconsideration" would

serve no useful purpose. Therefore, the PC's determination that petitioner violated work rule number one is based on substantial evidence in the record and the wording of the charge was not so vague as to constitute a denial of petitioner's due process rights.

CONCLUSION AND ORDER

For the reasons stated above, and based on the record herein, the decision of the Wisconsin Personnel Commission is affirmed.

Dated this 30 day of April, 1989

BY THE COURT:

Michael B. Torphy
Circuit Judge

cc: Atty Richard V. Graylow, 214 West Mifflin St., Madison, WI 53703-2594
AAG Steven M. Sobota, P.O. Box 7857, Madison, WI 53707-7857